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Marcia A. B. Thunberg

JAN 10 1989

October 4, 1988

George Mollineaux  
Assistant Commissioner  
Department of Environmental Services  
Hazen Drive  
Concord, New Hampshire 03301

RE: Administrative Rules for Water Testing  
Laboratory Certification

Dear Mr. Mollineaux:

In your inquiry of August 3, 1988, you requested this office to clarify whether RSA 148-B:4, II permits the Water Supply and Pollution Control Division ("Division") to adopt rules which broadly incorporate current and future regulations of the U.S. Environmental Protection Agency ("EPA") concerning certain methods for analysis of waste water and drinking water. Specifically, the Division wishes to adopt rules which cite and incorporate by reference corresponding regulations of EPA. It is our conclusion that while RSA 148-B:4 does allow incorporation of EPA regulations in their current format, automatic adoption by reference of future EPA standards is not contemplated by the statute and is contrary to the rulemaking requirements of RSA Ch. 541-A.

Generally, an administrative agency's rulemaking authority extends only so far as is necessary to fill in details which are necessary to effectuate the purpose of the statute, and rules which go beyond that are invalid. Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981). In this instance, RSA 148-B:4, II directs the



Division to establish a program to certify water testing facilities and laboratories which "shall be no less stringent than" that of EPA which regulates the same type facilities. While the Division is certainly free to adopt rules identical to those of the federal government in this area, the statute does not preclude adoption of rules more stringent than, or in a different format from, those of EPA. In that vein, the public notice and comment afforded by the RSA Ch. 541-A rulemaking process assures that adequate (and public) consideration is given to the various alternatives available to the Division. Absent an express legislative directive to the contrary, the Division must engage in the rule-making process pursuant to RSA 541-A whenever rules of the agency are amended.

The authority delegated by the legislature in RSA 148-B:4,II, then, falls far short of directing or allowing the Division to incorporate EPA regulations in a manner which will automatically adopt all future amendments by EPA without participating in the rulemaking process of RSA Ch. 541-A. If the Division should decide to simply incorporate into its rules those of EPA, it should adopt and specify the particular edition of the EPA regulation which is being incorporated. The substantive text of that citation will remain in effect, regardless of changes by the federal government, until such time as the Division amends its rule to incorporate an updated federal citation or some other substantive source.

Finally, you also asked whether the last sentence of Ws 306.07 is necessary to preserve an affected party's right to a hearing.<sup>1</sup> While the requirements of RSA 541-A:15,II impose a hearing requirement independent of whether there are Division rules pursuant to RSA 148-B:4,VIII, we advise that the Division should continue to explicitly provide for an administrative hearing in its rules so that there is no confusion regarding the issue. The Division should, however, update the provision to reflect the agency reorganization which occurred in 1986, or any amendments which may be appropriate.

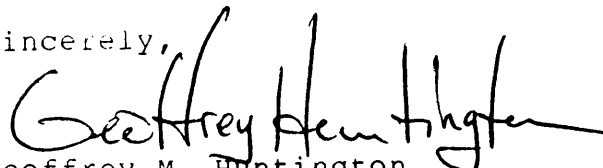
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<sup>1</sup>The referenced sentence states: "The affective [sic] party shall be given an opportunity to be heard at the next scheduled Commission meeting as provided for under RSA 541-A prior to any decision to deny, revoke or suspend such certification."

.George Mollineaux  
October 4, 1988  
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I trust this has been responsive to your inquiry. Please call me should any questions arise.

Sincerely,

A handwritten signature in black ink, appearing to read "Geoffrey M. Huntington". The signature is fluid and cursive, with a long horizontal stroke at the end.

Geoffrey M. Huntington  
Assistant Attorney General

GMH/jlc

0-88-036